Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

INDEX

PETITION:

	PAGE
Opinions Below	2
Basis of Jurisdiction	2
Questions Presented	3
Summary Statement of the Case	3
Reasons Relied Upon for Allowance of Writ and Argument in Support Thereof	6
Conclusion	11

APPENDIX:

Opinion of Court of Appeals (Exhibit A)	12
Petition for Rehearing (Exhibit B)	18
Motion to Enlarge Record and Affidavit of Bernard Taxin (Exhibit C)	23

TABLE OF CASES

Alaniz v. U. S., 257 F. 2d 108	7
Alvado v. General Motors Corp., 229 F. 2d 408	9
Associated Press v. U. S., 326 U. S. 1, 89 L. ed. 2013	10
Bragen v. Hudson Cty. News Co., 275 F. 2d 615	7
Cameron v. Vancouver Plywood Corp., 266 F. 2d 535	7

TABLE OF CONTENTS

PAGE

Hart v. Recordograph Corp., 169 F. 2d 580 7

Krieger v. Ownership Corp., 270 F. 2d 265 ..... 6, 7

Lynn v. Smith, 281 F. 2d 561 7

Michael Rose Productions, Inc. v. Loew's, Inc., 141 F. Supp. 257, 143 F. Supp. 606 7

Neff Instrument Corp. v. Cohu Electronics, Inc., 269 F. 2d 668 6

The Alabama Great So. R. Co., 224 F. 2d 1 10

Thomason v. Hospital T.V. Rentals, 272 F. 2d 636 8

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No.

JOHN TAXIN AND BERNARD TAXIN, trading as JOHN TAXIN CO.,
Petitioners,

VS.

FOOD FAIR STORES, INC., SAMUEL P. MANDELL CO., INC., WORLD WIDE PRODUCE CO., INC., MANDELL DISTRIBUTING CO., INC., M. G. S. MARKETING CO., INC., M. G. S. TOMATO DISTRIBUTORS, INC., ISRAEL KLEIN CO., INC., KLEIN PACKING CO., INC., IMPERIAL VEGETABLE CO., INC., GARDEN FRESH VEGETABLE PACKING CO., INC., TWIN PACKING CO., INC., DELAWARE VALLEY FRUIT DISTRIBUTING CO., INC., J. & B. PRODUCE CO., INC., SAMUEL P. MANDELL, ARTHUR ROSENBERG, LOUIS STEIN, MYER MARCUS, GEORGE FRIEDLAND and SAMUEL FRIEDLAND,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, John Taxin and Bernard Taxin, trading as John Taxin Co., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Third Circuit (Judges McLaughlin, Hastie and Forman), was filed on February 20, 1961, and has not been officially reported. (Exhibit A.)

A Petition for Rehearing (Exhibit B) was denied on March 14, 1961.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 stat. 928 (28 U. S. C. A. 1254).

QUESTIONS PRESENTED.

1. Was it proper for the Court of Appeals to affirm the award of summary judgment to one group of defendants in an antitrust action on the theory that there was no affirmative showing that they had participated in the obtaining of a release which petitioners pleaded had been obtained by fraud?

2. Where petitioners charged a conspiracy to violate the antitrust laws and charged that the release set up in defense thereto had been obtained by fraud and as part and parcel of the basic conspiracy, were petitioners not entitled to go to a jury on the release issue as to all defendants?

SUMMARY STATEMENT OF THE CASE.

Petitioners instituted this action on September 11, 1959 by filing a complaint (3a) in the District Court of the United States for the Eastern District of Pennsylvania charging, inter alia, that defendants had conspired to violate the antitrust laws by restraining trade and commerce in the distribution of food and produce in the Philadelphia area and had conspired to monopolize such trade and commerce; and that petitioners had suffered loss and damage thereby. Petitioners prayed that defendants be enjoined from further violation of the law and that defendants be required to pay petitioners money damages of $1,200,000.00.

Defendants filed answers to the complaint (11a) averring, inter alia, that petitioners were barred from recovery by reason of a release which petitioners had executed and de-

livered on March 28, 1958, the consideration for which was the payment of $18,000.00 to petitioner's counsel. By leave of court, petitioners filed replies under oath to these answers (20a) averring that the release was no bar to the action in that:

(a) Petitioners had been induced to sign the alleged release by reason of certain fraudulent representations made by certain of the defendants.

(b) Defendants had promised to purchase a minimum of $500,000.00 of fruit and produce from petitioners, but defendants stated that this promise would not be set forth in writing but that petitioners could rely upon defendants' good faith;

(c) Petitioners relied on defendants' representations and would not have executed the release had it not been for said representations;

(d) The release was obtained by fraud since defendants never intended to carry out their representations, but had made them in order to perpetuate the prior conspiracy;

(e) Petitioners received no consideration for the release; and

(f) The release was obtained by defendants as part of and in furtherance of the basic conspiracy charged in the complaint.

Thereafter, over petitioners objection, the trial judge ordered a separate trial of the release issue to a jury, filing a written opinion and order on December 14, 1959 (24a). During the course of the depositions of the individual defendants taken by petitioners in order to prepare for trial, petitioners were prevented from inquiring into the facts

concerning the basic conspiracy despite their contention that the opinion of the trial judge stated that they would have the right to do so. A Petition for Mandamus was filed in the Court of Appeals in an effort to correct this ruling, which petition was dismissed (280 F. 2d 277) and Certiorari was denied by this Court (362 U. S. 975, 4 L. ed. 2d 1010).

The present proceeding concerns a motion for summary judgment filed on November 19, 1959 by the Mandell defendants (22a). Petitioner John Taxin and his then attorney, William A. Gray, filed affidavits contra this motion (33a, 28a). The trial judge granted summary judgment to the Mandell defendants in an opinion filed on February 18, 1960 (44a), and petitioners, after permission granted, appealed to the Court of Appeals for the Third Circuit.

In an opinion filed February 20, 1961, the Court of Appeals affirmed the judgment of the District Court on the theory that petitioner, Bernard Taxin, had deposed that Mandell "had nothing to do with" the negotiations during which the fraudulent promises were said to have been made and, also, on the theory that petitioners had failed to prove the connection between the general conspiracy and the release.

Thereafter, petitioners filed a motion to enlarge the records so as to include the affidavit of Bernard Taxin (Exhibit C) in explanation of the isolated statement made in his depositions, and simultaneously therewith a petition for rehearing, both of which were denied by the Court on March 14, 1961.

The present petition seeks to review the action of the Court of Appeals for the Third Circuit.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT IN SUPPORT THEREOF.

1. The decision of the Court of Appeals for the Third Circuit is in conflict not only with its own decisions in other cases involving summary judgment but is also in conflict with the decisions of other Courts of Appeals.

2. The award of summary judgment under all the facts and circumstances of this case has deprived petitioners of their right to have a jury pass upon disputed issues of fact.

3. The action of the court below is in conflict with the decisions of this Court which hold that Rule 56 should be cautiously invoked in order that petitioners may always be afforded their day in court.

Petitioners contend that the Court of Appeals approached the motion for summary judgment as if petitioners had the burden of establishing that it should not be granted. The burden, was of course, on the defendants; *Neff Instrument Corp. v. Cohu Electronics, Inc.*, 269 F. 2d 668 (9 Cir., 1959); *Krieger v. Ownership Corp.*, 270 F. 2d 265 (3 Cir., 1959).

The Court of Appeals seized upon one isolated statement from the depositions of Bernard Taxin that Mandell "had nothing to do with" the negotiations during which the fraudulent promise was said to have been made and in effect, based its entire opinion on that statement.* Accompanying the petition for rehearing, petitioners moved the Court to consider the Affidavit of Bernard Taxin (Exhibit

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* The depositions of petitioners covered 650 pages of which over 550 contain the testimony of Bernard Taxin.

C) in explanation of this testimony, but the Court refused to do so and denied the petition.

The decision of the Court of Appeals is in conflict with the long-standing authority in the Third Circuit and elsewhere that:

> "Summary judgment may be granted only if the pleadings, depositions, admissions on file and affidavits . . . 'show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law' . . .
>
> "Any doubt as to the existence of a genuine issue of fact is to be resolved against the moving party.
>
> "Documents filed in support of a motion for summary judgment are to be used to determine whether issues of fact exist and *not* to decide the fact issues themselves."

(*Krieger v. Ownership Corp.*, supra; *Bragen v. Hudson County News Co.*, 278 F. 2d 615 (3 Cir., 1960); *Lynn v. Smith*, 281 F. 2d 561 (3 Cir., 1960); *Alaniz v. U. S.*, 257 F. 2d 108 (10 Cir., 1958); *Cameron v. Vancouver Plywood Corp.*, 266 F. 2d 535 (9 Cir., 1959).)

There is no apparent reason why the courts below determined to prevent petitioners from having a jury decide whether, in fact, Mandell had conspired with the Food Fair defendants and had, in fact, participated in the fraud by which the release was obtained in that Mandell paid two-thirds of the alleged consideration for the release and became a Vice President of Food Fair shortly after its execution. The law is clear that "no matter how likely it may seem that the pleader will be unable to prove the case, he is entitled, upon averring a claim, to an opportunity to prove it": (*Hart v. Recordograph Corp.*, 169 F. 2d 580 (3 Cir., 1948); *Michael Rose Productions, Inc. v. Loew's, Inc.*,

141 F. Supp. 257; 143 F. Supp. 606 (S. D. N. Y. 1956); *Thomason v. Hospital T. V. Rentals*, 272 F. 2d 636 (8 Cir., 1959).)

As a further basis for its decision, the Court of Appeals relied upon the fact that petitioners neither in their depositions nor by affidavit connected the general conspiracy with the release. The opinion of the Court of Appeals said that petitioners:

> "do not assert or offer to prove that the original conspiracy to restrain trade included any agreement . . . that persons who might complain of the hurtful consequences of the conspiracy would be mollified by bad faith, promises or further benefits."

And further the court said:

> "That it was at least incumbent upon plaintiffs, in opposing the motion for summary judgment, to state any special or unusual relation which the release may have borne to the general conspiracy."

It is incredible on this record that summary judgment is proper where petitioners tried in every way possible to do what the Court held was "incumbent" upon them to do, but were legally estopped from so doing by the trial court.* At the trial, petitioners could offer evidence which if believed by the jury would establish the general conspiracy and its relation to the release in question. This evidence would relate to the following disputes of fact:

1. Were plaintiffs promised by defendants business in the amount of $500,000 per year?

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* Petition for mandamus dismissed, 280 F. 2d 277, certiorari denied, 362 U. S. 975, 4 L. ed. 2d 1010.

2. Did plaintiffs rely on this promise to forego their suit for damages under the antitrust law?

3. The benefit, if any, in plaintiffs' abandoning their proposed action, in consideration of the payment of counsel fees?

4. Did defendants intend to carry out their promise at the time it was made?

5. Did defendants make the promise, never intending to comply for the purpose of perpetuating the conspiracy which existed among them?

a) Was there any arrangement between Mandell and some or all of the individual defendants for personal aggrandizement?

b) Was Mandell made an officer of Food Fair to continue this arrangement?

c) The significance, if any, in Mandell paying two-thirds of the consideration recited in the release?

6. Did not Mandell participate in the obtaining of the release from petitioners despite the fact that he was not personally present at the negotiation meetings?

The words of the late Judge Frank in *Alvado v. General Motors Corp.*, 229 F. 2d 408 (2 Cir. 1956), are particularly apposite:

"In such circumstances (especially where, as here, such a matter as good faith, or the like, is crucial) the granting of a summary judgment is error. For the opponent of the motion is thereby deprived of the opportunity to cross-examine the movant's officials, and is

> prevented from having a trial judge assisted in its evaluation of their credibility by observing their demeanor while they testify."

In the *Alvado* case, Judge Frank cited *The Alabama Great Southern R. Company case*, 224 F. 2d 1 (5 Cir., 1955), wherein the Court held:

> "In many recent cases, where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, and examination and cross-examination were necessary instruments in obtaining the truth, we have pointed out that and why the issues may not be disposed of on summary judgment."

All petitioners seek here is the right to be heard. This Court has always studiously guarded this right. In *Associated Press v. U. S.*, 326 U. S. 1, 89 L. ed. 2013 (1945), it held (2022):

> "We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them."

We can contemplate no more fundamental dispute of fact than appears in these proceedings. A jury should be permitted to determine on the evidence presented whether Mandell had in fact conspired with Food Fair, whether in fact he was aware of the negotiations leading to the release and whether he in fact participated in the fraud of his co-spirators.

We urge this Court to afford to petitioners the opportunity to attempt to establish to a jury Mandell's participation and culpability.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this case is one which justifies the allowance of a Writ of Certiorari, and that this Court should thereafter review and reverse the adverse decision of the court below.

LESTER J. SCHAFFER,
Attorney for Petitioners.

APPENDIX.

EXHIBIT A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,218

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 28, 1960
Before: McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges*.

OPINION OF THE COURT

[Filed February 20, 1961]

By HASTIE, *Circuit Judge*.

In this civil antitrust suit the appellants, John and Bernard Taxin, who are wholesale distributors of fruit and produce in the Philadelphia area, have charged numerous defendants with conspiracy to restrain and monopolize interstate commerce in fruit and produce. One group

of defendants, associated with defendant Food Fair Stores, Inc., will be called Food Fair or the Food Fair defendants. The second group, the appellees here, associated with defendant Samuel P. Mandell Co., Inc., will be called Mandell or the Mandell defendants.

Answering the complaint, all of the defendants pleaded a general release wherein the Taxins, for a consideration of $18,000 paid in cash to their counsel, released the defendants from liability for all claims under the antitrust laws or otherwise which the Taxins might have had against them on or before March 28, 1958, the date of the release. Replying to this affirmative defense, the appellants admitted the execution of the release but pleaded that it had resulted from Food Fair's promise to buy produce from the appellants in the future, and that this promise had been made in bad faith with a view to furthering the conspiracy to restrain trade.

The district court agreed to try the question of the validity of the release separately before considering any other issue. Accordingly, various depositions and affidavits were filed with reference to this question. The Mandell defendants then filed a motion for summary judgment asserting that, on the pleadings and the facts established and not disputed in the record, the release was valid as to them no matter what grounds of avoidance might be said to exist as against the Food Fair defendants. The court sustained this contention and granted summary judgment in favor of the Mandell defendants. From that partial disposition of the litigation this court has allowed an immediate appeal as authorized by Section 1292 (b) of Title 28, United States Code.

It is clear and not disputed that the release was intended and on its face is sufficient to bar the appellants from maintaining the present suit insofar as it pertains to injuries occurring before March 28, 1958. It is also conceded that

$18,000 was paid to counsel for the appellants as consideration for the release. This sum, of which $12,000 was paid by Mandell, was used to satisfy the Taxins' obligations to their counsel.

To avoid the release appellants assert that they were induced to execute the instrument by a promise made in bad faith that Food Fair Stores, Inc. would buy $500,000 worth of fruit and produce from them annually. Affidavits of appellant John Taxin and his attorney William A. Gray, Esquire, state that Louis Stein, Myer Marcus, and Arthur Rosenberg, described as "the principals of Food Fair Stores", were the parties who made or were present at the making of the alleged fraudulent promise. For present purposes we assume, *but* do not decide, that there is a substantial controversy yet to be litigated between appellants and the Food Fair defendants whether or not those defendants made a fraudulent promise in order to obtain a release. *Cf. Michael Rose Productions, Inc. v. Loew's, Inc.*, S.D.N.Y. 1956, 141 F. Supp. 257, 143 F. Supp. 606. But the affidavits and allegations which support the claim of fraud do not charge that the Mandell defendants participated in or even knew of the alleged misrepresentation. Indeed, appellant Bernard Taxin has deposed that Mr. Mandell "had nothing to do with" the negotiations during which the fraudulent promise is said to have been made.

The exculpation of the Mandell defendants was one important basis of the district court's conclusion that the release was valid as to these parties. In analogous circumstances the Court of Appeals for the Second Circuit has suggested that it would in inequitable to deny one antitrust defendant the benefit of a settlement and release solely because of fraud, unknown to him, on the part of another defendant in connection with such settlement release. *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 1960, 278 F. 2d 798, 802. This is in accord with the

rule of Section 477 of the Contracts Restatement, which reads as follows:

> "Fraud or material misrepresentation by a third person renders a transaction voidable by a party induced thereby to enter into it if the other party thereto
>
> (a) has reason to know of the fraud or misrepresentation before he has given or promised in good faith something of value in the transaction or changed his position materially by reason of the transaction, or
>
> (b) is affected by the fraud or misrepresentation under the law of Agency or of Trusts."

For an application of that section of the Restatement by this court see *Blum v. William Goldman Theatres, Inc.*, 1947, 164 F. 2d 192.

Despite the admission that the Mandell defendants "had nothing to do with" the alleged fraudulent promise, appellants have sought to imply some privity from the fact that Mandell paid $12,000 of the $18,000 cash consideration for the release and the additional fact that some months thereafter Samuel P. Mandell, a dominant personality among the Mandell defendants, became a vice-president of Food Fairs Stores, Inc. No more need be said of these circumstances than that in our view they have no tendency to prove guilty participation in or even knowledge of the alleged fraud by any of the Mandell defendants. Indeed, the giving of a substantial independent cash consideration for the release supports the claim that the release is valid. *Cf. Talmadge v. United States Shipping Board Merchant Fleet Corp.*, 2d Cir. 1933, 66 F. 2d 773, *cert. denied* 1934, 291 U. S. 669. This fact combined with the blamelessness of these defendants in the making of the alleged fraudulent

promise would normally suffice to establish the validity of their release. *Cf. Martina Theatre Corp. v. Schine Chain Theatres, Inc., supra.*

In this case, however, we must deal with one more point which the appellants have greatly stressed. In their reply to the affirmative plea of release they have asserted that "the alleged release was obtained by defendants as part of and in furtherance of the continuing conspiracy among the defendants about which plaintiffs complain". This in itself is said to preclude summary judgment. However, this allegation must be interpreted and considered in the light of Bernard Taxin's deposition which concedes that the Mandell defendants had nothing to do with alleged fraudulent representation by the Food Fair defendants. In these circumstances, it seems to be appellants' theory, and indeed it is so stated in their brief, that if the original conspiracy of Food Fair and Mandell to restrain trade can be proved, "Mandell would be responsible for the acts of his co-conspirators [in connection with the release] whether or not he participated therein". The court below properly pointed out that this "would mean that in any case in which a group of conspirators were involved in an antitrust case none could obtain a valid, binding release if one of the conspirators obtained a release by fraud".

On our view the fatal defect in appellants' argument lies in its failure to respect the limits within which the law confines the responsibility of a conspirator for acts of a coconspirator. The accepted and prevailing rule has been clearly stated by District Judge Wyzanski in *Momand v. Universal Film Exchange,* D.Mass. 1947, 72 F. Supp. 469, 475, *aff'd* 1st Cir. 1948, 172 F. 2d 37, *cert. denied* 1949, 336 U.S. 967: "Conspirators are chargeable with the acts of their fellows only if the acts are done in the furtherance of the joint venture as all understood it; they are not to be held for what some of the conspirators, unknown to the

rest, do beyond the reasonable intendment of the common understanding." Here, though plaintiffs have undertaken to file affidavits concerning the relation of the various defendants to the alleged fraudulent release, they do not assert or offer to prove that the original conspiracy to restrain trade included any agreement or common understanding that persons who might complain of the hurtful consequences of the conspiracy would be mollified by bad faith promises of future benefits. If the appellants were relying on their ability to prove such agreement, certainly the motion for summary judgment should have prompted them to say so. We are more inclined to require such an explanation because we are not able to imagine any meaningful way in which the obtaining of a release could be, in appellants' own words, "part of and in furtherance of the continuing conspiracy among the defendants about which plaintiffs complain". In simple logic a release given on March 28, 1958, could not facilitate any restraint of trade which had already been accomplished. If, on the other hand, plaintiffs mean that a release might further the conspiracy after its execution, this argument has no significance here because the release in suit clearly does not bar a suit for damages occurring after March 28, 1958, and the court's order granting summary judgment was limited accordingly. Thus, we cannot see how the release could have any effect except to compromise existing claims for past misconduct.[1]

In such circumstances, we hold that it was at least incumbent upon plaintiffs, in opposing the motion for sum-

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[1] This reasoning also disposes of a suggestion, which seems to be implicit in appellants' brief, that Mandell's complicity in fact in the Food Fair misrepresentation can be inferred from the general conspiracy in restraint of trade to which Mandell is said to have been party. In our view, this would require sheer speculation rather than the drawing of a logical inference. It would therefore, have been improper for the district court to have permitted a jury to reach such a conclusion.

mary judgment, to state any special or unusual relation which the release may have borne to the general conspiracy. Since nothing of that sort appears in the affidavits or was even suggested during the discussion of this point on oral argument, plaintiffs' unexplained and unsupported allegation that the obtaining of the release was part of or in furtherance of the original conspiracy does not suffice to prevent the granting of summary judgment.

For these reasons the judgment of the district court will be affirmed.

EXHIBIT B.

PETITION FOR REHEARING.

To the Honorable, the Chief Judge and Associate Judges of the said Court:

The Petitioners, John Taxin and Bernard Taxin, trading as John Taxin Co., by their attorney, Lester J. Schaffer, respectfully petition the Court for a rehearing in the above entitled case.

Petitioners (plaintiffs below), had appealed to this Court from the order of the court below granting summary judgment to one group of defendants (hereinafter referred to as "Mandell"), in an anti-trust action in which they had charged Mandell with conspiring with another group of defendants (hereinafter referred to as "Food Fair"). Both groups of defendants filed answers to the complaint averring, inter alia, that plaintiffs were barred from recovery by reason of a release executed on March 28, 1958, for which they had received $18,000.00. Plaintiffs filed replies averring that the release had been obtained by fraud. The

trial judge ordered a separate trial of the release issue to a jury. Mandell filed a motion for summary judgment in which he prevailed in the court below.

The opinion of this Court, filed February 20, 1961, affirmed the judgment of the court below on the theory that the record before it contained no genuine issues of fact to be submitted to a jury and, therefore, summary judgment was proper.

Petitioners respectfully request this Court to grant a rehearing for the following reasons:

1. In sustaining the lower court's award of summary judgment, the opinion of this Court is contrary to the long line of authority in this Circuit and in other jurisdictions in that there are disputed issues of fact which must be resolved by a jury.

2. The opinion of this Court relies heavily on the statement in the depositions of Bernard Taxin (8b) that Mr. Mandell "had nothing to do with" the negotiations at which the fraudulent promises were allegedly made. It is clear that the statement quoted was intended to convey only the thought that Mandell was not *physically* present during any of the negotiations with petitioners.* The question to be resolved, however, is whether Mandell was *legally* present so as to be chargeable with the statements made by his co-conspirators, or whether he was so involved with them as necessarily to be chargeable with knowledge thereof. On this point, there is ample on the record which would permit a jury to infer that he was. For example, the record shows:

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* Since this specific point was not raised by counsel for defendants, either in their brief or argument, petitioners, simultaneously herewith have filed a motion requesting leave to submit the affidavit of Bernard Taxin for consideration by the Court in connection with the within petition.

(a) Mandell has been charged with conspiring with Food Fair in the original complaint (Plaintiffs' Appendix 7a, 9a).

(b) Petitioners' reply to the Mandell answer charges that the "alleged release was obtained . . . as part of and in furtherance of the continuing conspiracy" (Plaintiffs' Appendix 21a).

(c) The depositions filed of record but not entirely printed in either of the parties' appendices show:

1) Mandell was aware of the conference between the Food Fair people and the Taxins as far back as the latter part of 1957 (Depositions of S. P. Mandell, January 11, 1960, page 15).

2) Louis Stein* told the Taxins that Mandell would have to pay the entire consideration for the release (Depositions of John Taxin, October 22, 1959, page 504).

3) Stein told Taxin that the $18,000.00 consideration was "okay" with Food Fair if Mandell agreed (Depositions of Louis Stein, December 28, 1959, page 23).

4) Mandell's appointment as Vice President of Food Fair was under consideration for "sometime" prior to November, 1958 (same Depositions, page 31).

5) Stein conceded that he may have discussed the Taxin meetings with Mandell both prior to and subsequent to the meeting of February 5, 1958 (same Depositions, pages 42-43).

6) Food Fair buyers were instructed to purchase a great portion of their requirements from Mandell

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* President of Food Fair.

(Depositions of Myer Marcus,** December 28, 1959, pages 50, 63). And this was the result of a pre-conceived plan with Mandell (same Depositions, page 90).

7) Marcus had discussed the Taxin problem with Mandell prior to February 5, 1958 (same Depositions, page 102).

8) Food Fair had a buying arrangement with Mandell as far back as 1949 (Depositions of Arthur Rosenberg,** December 29, 1959, page 19).

3. The opinion of this Court ignores the possibility that a jury could infer, on the basis of circumstantial evidence, that Mandell had participated with Food fair in the illegal acts culminating in the execution of the purported release.

4. Since Mandell was admittedly Food Fair's main source of supply for fruit and produce; since Mandell admittedly knew of the Taxin problem prior to the meeting of February 5, 1958 and the execution of the alleged release of March 28, 1958; since his counsel was advised by Food Fair of the position taken by petitioners (see, for example, letter dated February 11, 1958, Plaintiffs' Appendix 32a); and since Mandell in fact paid $12,000.00 of the $18,000.00 consideration for the release, it is submitted that there are ample disputes of fact on this record to prevent the award of summary judgment. Mandell's participation in, or knowledge of, the fraudulent representations allegedly made by Food Fair is a matter for jury determination, based upon facts appearing of record and facts to be adduced at the trial. We submit that on this record there is sufficient to afford to petitioners at least the opportunity to attempt to make out their case before a jury.

** Vice Presidents of Food Fair.

5. The opinion of the Court states that petitioners: "do not assert or offer to prove that the original conspiracy to restrain trade included any agreement . . . that persons who might complain of the hurtful consequences of the conspiracy would be mollified by bad faith promises of future benefits."

Likewise the opinion stated:

> "that it was at least incumbent upon plaintiffs, in opposing the motion for summary judgment, to state any special or unusual relation which the release may have borne to the general conspiracy."

The record in this case shows that petitioners did attempt to inquire into the general conspiracy, but were prevented from so doing by the trial judge. Recognizing the importance of connecting the release to the general conspiracy, petitioners attempted to correct this ruling by filing a petition for mandamus, which this Court dismissed (280 F. 2d 277) and certiorari was denied (362 U. S. 975, 4 L. ed. 2d 1010).

6. The opinion of the Court assumes the innocence of Mandell solely upon the statement in the depositions of Bernard Taxin, without any reference to the other facts of record. We submit that this is contrary to the rule of this Circuit: *Kreiger v. Ownership Corp.*, 270 F. 2d 265, 270 (3 Cir. 1959), in which the Court said:

> "We are compelled to the observation that courts should not for the purpose of expeditious motions for summary judgments 'short cut' such proceedings by 'assuming' factual situations."

7. The opinion of this Court precludes petitioners from presenting to a jury facts which at the very least are in

doubt. We request this Court to grant a rehearing to afford the petitioners the opportunity to argue that they should be entitled to go to a jury to attempt to prove their case.

Respectfully submitted,

LESTER J. SCHAFFER,
Attorney for Petitioners.

It is hereby certified that the within Petition for Rehearing is presented in good faith and not for the purpose of delay.

LESTER J. SCHAFFER.

EXHIBIT C.

MOTION TO ENLARGE RECORD.

Plaintiffs, John Taxin and Bernard Taxin, trading as John Taxin Co., by their attorney, Lester J. Schaffer, move the Court of permission to file of record the affidavit of Bernard Taxin (attached hereto) for consideration in conjunction with the Petition for Rehearing simultaneously filed herewith, for the following

REASONS:

1. The opinion of the Court (filed February 20, 1961) has considered and has relied heavily upon one statement from the depositions of Bernard Taxin, to wit, that the

Mandell defendants had "nothing to do with" the settlement.

2. It is important to plaintiffs' position on the Petition for Rehearing that Bernard Taxin be permitted to explain the statement referred to.

3. The affirmance of an award of summary judgment should stand only if the Court is satisfied that all of the facts established conclusively that no genuine dispute exists, and the affidavit submitted contains information which is vital to such a determination.

WHEREFORE, plaintiffs pray that leave be granted to file the affidavit attached hereto so that it may be considered in conjunction with the Petition for Rehearing.

LESTER J. SCHAFFER,
Attorney for Plaintiffs.

AFFIDAVIT OF BERNARD TAXIN.

Commonwealth of Pennsylvania }
County of Philadelphia } ss.

BERNARD TAXIN, being duly sworn according to law, deposes and says that he is one of the plaintiffs abovenamed; that the opinion of this Court filed February 20, 1961 has been called to his attention; that the Court has referred to a statement made in the depositions of your affiant, as follows: "Indeed, appellant Bernard Taxin has deposed that Mr. Mandell 'had nothing to do with' the negotiations during which the fraudulent promise is said to have been made"; and, again: "However, this allega-

tion must be interpreted in the light of Bernard Taxin's deposition which concedes that the Mandell defendants had nothing to do with alleged fraudulent representation by the Food Fair defendants"; that your affiant concedes that he testified at page 625 of his depositions that Mr. Mandell "had nothing to do with the settlement", but that he meant merely that he was not physically present at the meetings with your affiant and John Taxin; that this limited construction of his testimony is not in accord with the true facts of the case since he was fully aware of Mandell's participation in the settlement by reason of his payment of $12,000.00 of the $18,000.00 consideration and further by reason of his long-standing business relationship with the Food Fair defendants; that he believed, when questioned, that he was being asked only whether Mandell had coerced him into the settlement and his answer meant to convey the thought only that he had not; that affiant makes this affidavit in an effort to present to the Court the pertinent facts to be considered in conjunction with the Petition for Rehearing filed simultaneously herewith.

BERNARD TAXIN.

(Jurat)

LE COPY

Supreme Court of the United States

October Term, 1960

No. 901.

[redacted]

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

[redacted]

INDEX.

	Page
Opinions Below	1
Questions Presented	2
Respondents' Statement of the Case	2
Argument	7
Conclusion	10

TABLE OF CASES CITED.

	Page
Associated Press v. United States, 326 U. S. 1	8
Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F. 2d 798 (2d cir. 1960)	9
Nocito v. Lannuitti, 402 Pa. 288 (1961)	9
United States v. Krasnov, 143 F. Supp. 184 (E. D. Pa. 1956), affirmed 355 U. S. 5	8

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 901.

JOHN TAXIN AND BERNARD TAXIN, TRADING AS JOHN TAXIN CO.,

Petitioners,

v.

SAMUEL P. MANDELL CO., INC., MANDELL DISTRIBUTING CO., INC., AND SAMUEL P. MANDELL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 181 F. Supp. 181 (E. D. Pa. 1960).

The opinion of the Court of Appeals for the Third Circuit affirming the decision of the District Court has not been officially reported and is printed as Exhibit A to the Petition for Certiorari.

QUESTIONS PRESENTED.

Was the Court of Appeals justified in sustaining a summary judgment entered by the District Court in favor of Respondents on the basis of a general release given by Petitioners to Respondents: (a) where Petitioners admitted that Respondents were not parties to misrepresentations alleged by Petitioners to have been made by other defendants to induce execution of the release; (b) where the undisputed documentary record shows conclusively that there is no genuine issue of fact with regard to Petitioners' conclusory allegations in their pleadings that misrepresentations had been made by the other defendants; (c) where it was admitted that Respondents paid an independent consideration for the release, which was negotiated between their counsel and Petitioners' counsel; and (d) where Petitioners refused to tender a return of that consideration?

RESPONDENTS' STATEMENT OF THE CASE.

On March 28, 1958 plaintiffs (Petitioners here) gave defendants (Respondents) a general release including specifically a release of all antitrust claims.[1] The release was negotiated between counsel for the parties, was under seal, and recited payment of the consideration of $18,000 (R. 18a-19a).

On September 11, 1959 plaintiffs filed this action, based on the same antitrust claims which they had already released, namely that Food Fair, certain of its executives and related companies (referred to as Food Fair) had conspired in 1949 with Samuel P. Mandell Co., Inc., Mandell Distributing Co., Inc. and Samuel P. Mandell (the Respondents here, referred to as Mandell) to restrain trade

1. Record references are to pages in the printed Court of Appeals' Appendix filed in this Court by Petitioners.

and commerce in the distribution of food and produce in the Philadelphia area. Defendants, in their answers, pleaded the release (R. 17a) and plaintiffs, having obtained leave to reply, alleged that they had been induced to sign the document "by reason of certain representations made by certain of the individual defendants, to wit, that in consideration of their executing the said document, plaintiffs were promised that Food Fair Stores, Inc. would purchase from them a minimum of $500,000 worth of fruit and produce per year; that plaintiffs would have to rely on the good faith of the defendants to perform since no written agreement setting forth the terms could or would be entered into." They also alleged that defendants never intended to carry out their promise and thereby fraudulently induced execution of the release. They further alleged that the release was obtained as part of the original conspiracy "as a prerequisite to dissolution of the S. P. Mandell Co., and the appointment of the said Samuel P. Mandell as a vice-president of Food Fair Stores, Inc." (R. 20a-21a). An affidavit of plaintiff, John Taxin, specified that the alleged promise was made on February 5, 1958, and only on that date (R. 33a-34a).

Plaintiffs made the following admissions of record in their depositions:

Mandell made no representations to plaintiffs to induce them to sign the release (R. 8b-9b). The release was executed voluntarily without coercion from any of the defendants (R. 8b-9b). Mandell was not present or represented at the meeting of February 5, 1958, where the promise is said to have been made, and was not alleged to have breached any promise to plaintiffs (R. 8b). Plaintiffs' claim of fraud was based solely on the failure by defendant Food Fair to carry out the alleged oral promise made seven weeks before the release, on February 5, 1958, by Louis Stein, president of Food Fair, to the effect that Food Fair would purchase from plaintiffs a minimum of $500,000 worth of fruit and produce per year (R. 4b-5b, 6b, 20a).

On February 7, 1958, plaintiffs' counsel, Gray, wrote to counsel for Food Fair, Shapiro, setting forth, with the knowledge and approval of plaintiffs, his understanding of the meeting of February 5, 1958 (R. 6b-7b). Gray's letter stated:

> "As the result of the last conference held on February 5 between our respective clients, we are now prepared to submit a final settlement proposal.
>
> "We understand that, by reason of the statements made at this last meeting by Messrs. Stein, Rosenberg and Marcus, supplementing the statements made at a prior meeting by Stein and Rosenberg, our clients are willing to accept, on faith, the commitment that they will be treated fairly hereafter in the matter of Food Fair's purchases of produce and that every effort will be made by Food Fair to give them a substantial share of such business.
>
> "Our clients, therefore, relying upon the good faith arrangements proposed by your clients, will execute an immediate release to be prepared by you, subject of course, to our approval. The consideration for the release we suggest should be the $25,000 figure which, among other expenditures, represents the out-of-pocket expense or obligations of our clients." (R. 30a-31a)

This letter made no reference to any promise to buy $500,000 worth of fruit and produce a year from plaintiffs, but, be that as it may, on February 11, 1958 Food Fair's counsel, Shapiro, replied in writing as follows:

> "I have talked to Harold Kohn who represents Mandell and who received a copy of your letter in re the above matter and I am writing to you on his behalf representing Mr. Mandell as well as for my client. It is our understanding from our clients that no such promises as you have set out in your letter were made to your clients at these conferences.

> "If the offer contained in your letter of February 7th is based upon the assumption that these promises were made and upon reliance that those alleged promises will be carried out, then the offer cannot be accepted. Secondly, our clients will not agree to pay any sum in excess of $15,000 as a fee to you as counsel in exchange for a fully complete release." (R. 32a)

Thereafter, as testified to, and not disputed by plaintiffs, the settlement was negotiated between counsel, Mandell being at all times represented by his own counsel, and the release was finally executed on March 28, 1958, reciting a consideration of $18,000 (R. 12b). Mandell himself had nothing to do with the settlement (R. 8b). His meetings with regard to the negotiation and execution of the release were solely with his own counsel (R. 12b). Mandell paid $12,000 of the consideration for the release (R. 12b). Plaintiffs have never tendered back any of this $18,000, though they admit $5,000 of it was returned to them personally by their counsel (R. 34a). Plaintiffs also admitted that all of the claims and causes of action set forth in the complaint were covered by the release (R. 4b-6b).

On the basis of this record, Mandell moved for summary judgment. In opposition to the motion, plaintiffs filed an affidavit of their former counsel, Gray, and of one of the plaintiffs, John Taxin (R. 28a-32a; 33a-34a). Gray's affidavit attached the letters of February 7 and 11, 1958 exchanged between himself and Food Fair's counsel, Shapiro. Gray stated in his affidavit that: ". . . on February 13, 1958, your deponent received a letter dated February 11, 1958, from Harry Shapiro, Esquire, a copy of which is attached hereto as Exhibit 'B'; that thereafter there were numerous conferences among counsel, resulting in the ultimate execution of a release on March 28, 1958; . . .", and that: ". . . at no time during these conferences was there any denial of the agreement by Food Fair Stores, Inc. to make the purchases as aforesaid; . . ." He nowhere averred, nor did plaintiff, John Taxin aver in his affidavit,

that any promise or representation regarding the purchase of fruit and produce from plaintiffs was made or renewed after the express repudiation of any such basis for settlement in Shapiro's letter of February 11, 1958. On the contrary, Taxin's affidavit recited that the sole promise relied on was made on February 5, 1958.

The District Court granted Mandell's motion for summary judgment on the ground that the record, based on plaintiffs' own admissions, was barren of any evidence of fraud on Mandell's part in obtaining the release. The Court of Appeals affirmed, and denied a petition for rehearing. After the affirmance by the Court of Appeals, the plaintiffs for the first time in any of the proceedings below contended that their admissions in their depositions did not in fact mean what they plainly said. The plaintiffs moved to enlarge the record in the Court of Appeals to include an affidavit changing the meaning of what they had said in their depositions. This motion was denied.

ARGUMENT.

The District Court and the Court of Appeals held that the Mandell defendants, who are the Respondents here, were given a general release, including a release of antitrust claims, by the plaintiffs on March 28, 1958, for which the plaintiffs were paid by the Mandell defendants independently a consideration of $12,000. Although this payment was made to the plaintiffs' counsel, it was used to discharge the plaintiffs' obligation to their counsel and part of it was returned by their counsel to the plaintiffs themselves. Attempting to avoid the effect of this release, the plaintiffs pleaded that it was obtained by fraud, the fraud allegedly consisting of the breach of an alleged promise by the other defendants.

However, they admitted unequivocally of record in their depositions that no fraud was committed by the Mandell defendants. It was uncontradicted in the record that the plaintiffs' counsel negotiated separately with counsel for the Mandell defendants for their release and that plaintiffs received a separate consideration from Mandell. No connection was ever alleged or shown between Mandell and the alleged fraudulent representation. The plaintiffs pleaded that the release was a continuing part of the original antitrust conspiracy, but that conspiracy, they claimed, began in 1949 whereas the release was not negotiated until 1958. As the Court of Appeals said: "In simple logic, a release given on March 28, 1958 could not facilitate any restraint of trade which had already been accomplished." The plaintiffs set forth nothing in their affidavits opposing the motion for summary judgment which would show any connection between the release and the general conspiracy and the Court of Appeals was justified in concluding that: "In such circumstances, we hold that it was at least incumbent upon plaintiffs, in opposing the motion for summary judgment, to state any special or unusual re-

lation which that release may have borne to the general conspiracy. Since nothing of that sort appears in the affidavits or was even suggested during the discussion of this point on oral argument, plaintiffs' unexplained and unsupported allegation that the obtaining of the release was part of or in furtherance of the original conspiracy does not suffice to prevent the granting of summary judgment."

Thus, on the undisputed facts in the record, summary judgment was fully justified. In the only decision of this Court cited in the plaintiffs' petition, *Associated Press v. United States*, 326 U. S. 1, it is noteworthy that on the basis of written records and admitted facts, summary judgment was held to be proper. This Court also sustained a summary judgment in another antitrust case, affirming the decree of the District Court in *United States v. Krasnov*, 143 F. Supp. 184 (E. D. Pa. 1956), affirmed 355 U. S. 5, on the basis of the uncontradicted documentary evidence in the record.

The Mandell defendants also argued in the courts below that the record sustained the granting of summary judgment on two other grounds. The first such ground was that the alleged fraudulent promise relied on by the plaintiffs was rejected in writing by counsel for all defendants prior to execution of the release (R. 30a-32a). Counsel for the defendants expressly wrote to counsel for plaintiffs: "If the offer contained in your letter of February 7th is based upon the assumption that these promises were made and upon reliance that those alleged promises will be carried out, then the offer cannot be accepted." With this express rejection before them, the plaintiffs thereafter executed the release, and the release itself contained no reference to any promise. The plaintiffs did not allege in any of their pleadings or affidavits that the defendants made any promise after the plaintiffs received the express rejection set forth in the above letter. The only promise they relied on was alleged to have been made on February 5th. This documentary record, under the principles of the *Kras-*

nor case, negates the entire basis of the plaintiffs' claim that the release was obtained by fraud or as part of a conspiracy, and is an additional ground justifying summary judgment for the defendants.

It was also argued below by the defendants that the plaintiffs could not challenge the release because they had not tendered back the consideration which they received for it, namely $12,000 from the Mandell defendants, and $6,000 from the other defendants. The Supreme Court of Pennsylvania held in *Nocito v. Lannuitti*, 402 Pa. 288 (1961), that a plaintiff's claim was barred by a release, which the plaintiff alleged was procured by fraud. At page 290, the court said: "If the procurement of this release was by fraud, when Nocito discovered it, he had his choice either to disaffirm the contract and offer to return to Lannuitti or his insurance carrier the consideration for this release or to affirm the voidable contract and waive the fraud. Nocito's failure to tender back the consideration after he discovered the alleged fraud constituted a waiver of the fraud and an affirmation of the contract . . ." Similarly in the present case, the plaintiffs having failed to tender back the consideration for the release, have affirmed it and are not in any position to challenge its effect.

The courts below did not find it necessary to discuss these two additional grounds sustaining the summary judgment in favor of the Mandell defendants, but the record itself supports these grounds conclusively.

There is no conflict in the circuits. The closest analogy is in *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F. 2d 798 (2d cir. 1960), in which the Second Circuit reached the same result. The cases relied on at page 6 of the Petition simply hold that on the records there involved, there were issues of fact precluding summary judgment. There are no such issues here. None of the other grounds which normally prompt this Court to grant a petition for certiorari exist here.

CONCLUSION.

For the reasons set forth above, the respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

AARON M. FINE,
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Attorneys for Respondents.